

**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

ALBERTO LIZARRAGA,

Case No. 1:23-cv-01543-SKO (HC)

Petitioner,

## FINDINGS AND RECOMMENDATION TO DISMISS SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS

UNITED STATES DISTRICT COURT,

ORDER DIRECTING CLERK OF COURT  
TO ASSIGN DISTRICT JUDGE

## Respondent.

[TWENTY-ONE DAY OBJECTION  
DEADLINE]

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus

pursuant to 28 U.S.C. § 2254. He filed the instant petition in the Sacramento Division of this

District on September 25, 2023. The petition was transferred to this Court on October 31, 2023.

Because the petition is successive, the Court will recommend it be **DISMISSED**.

## DISCUSSION

Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to relief." Rule 4 of the Rules Governing § 2254 Cases; see also Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990). A petition for habeas corpus should not be dismissed without leave to amend unless it appears that no tenable claim for relief can be pleaded were such leave granted. Jarvis v. Nelson,

1 440 F.2d 13, 14 (9th Cir. 1971).

2       A federal court must dismiss a second or successive petition that raises the same grounds  
3 as a prior petition. 28 U.S.C. § 2244(b)(1). The court must also dismiss a second or successive  
4 petition raising a new ground unless the petitioner can show that 1) the claim rests on a new,  
5 retroactive, constitutional right or 2) the factual basis of the claim was not previously  
6 discoverable through due diligence, and these new facts establish by clear and convincing  
7 evidence that but for the constitutional error, no reasonable factfinder would have found the  
8 applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the  
9 district court that decides whether a second or successive petition meets these requirements.

10       Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by  
11 this section is filed in the district court, the applicant shall move in the appropriate court of  
12 appeals for an order authorizing the district court to consider the application." In other words,  
13 Petitioner must obtain leave from the Ninth Circuit before he can file a second or successive  
14 petition in district court. See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must  
15 dismiss any second or successive petition unless the Court of Appeals has given Petitioner leave  
16 to file the petition because a district court lacks subject-matter jurisdiction over a second or  
17 successive petition. Burton v. Stewart, 549 U.S. 147, 152 (2007); Cooper v. Calderon, 274 F.3d  
18 1270, 1274 (9th Cir. 2001).

19       In this case, Petitioner challenges his 2013 conviction in the Kern County Superior Court  
20 for attempted murder with great bodily injury enhancements. Petitioner previously sought  
21 federal habeas relief in this Court with respect to the same conviction in Lizarraga v. Lundy,  
22 Case No. 1:23-cv-00888-JLT-SKO. The petition was dismissed with prejudice on August 29,  
23 2023, for failure to establish a ground for federal habeas relief. This dismissal constitutes a  
24 determination on the merits for purposes of the "second or successive" rule. See Graham v.  
25 Costello, 299 F.3d 129, 133 (2d Cir. 2002) (denying relief in first petition on ground that claim  
26 was not cognizable under Stone v. Powell).

27       The Court finds that the instant petition is second or successive under 28 U.S.C. §  
28 2244(b). Petitioner makes no showing that he has obtained prior leave from the Ninth Circuit to

1 file his successive petition. Therefore, this Court has no jurisdiction to consider Petitioner's  
2 renewed application for relief under 28 U.S.C. § 2254 and must dismiss the petition. See Burton,  
3 549 U.S. at 157.

4 **ORDER**

5 Accordingly, the Clerk of Court is DIRECTED to assign a District Judge to this case.

6 **RECOMMENDATION**

7 For the foregoing reasons, the Court HEREBY RECOMMENDS that the petition be  
8 DISMISSED as successive.

9 This Findings and Recommendation is submitted to the United States District Court  
10 Judge assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and  
11 Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of  
12 California. Within twenty-one days after being served with a copy, Petitioner may file written  
13 objections with the Court. Such a document should be captioned "Objections to Magistrate  
14 Judge's Findings and Recommendation." The Court will then review the Magistrate Judge's  
15 ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). Petitioner is advised that failure to file objections  
16 within the specified time may waive the right to appeal the District Court's order. Martinez v.  
17 Ylst, 951 F.2d 1153 (9th Cir. 1991).

18 IT IS SO ORDERED.

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20 Dated: November 1, 2023

/s/ Sheila K. Oberto

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22 UNITED STATES MAGISTRATE JUDGE  
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